Supreme Court, U.S.

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NO.

IN THE

Supreme Court of the United States

DAN McKIMM,

Petitioner

v.

OHIO ELECTIONS COMMISSION

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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74pp

QUESTIONS PRESENTED

1. MAY A STATE ADMINISTRATIVE BODY, SUCH AS THE OHIO ELECTIONS COMMISSION, PUNISH A CANDIDATE FOR PUBLIC OFFICE FOR THE PUBLICATION OF A DOCUMENT THAT IS FAIRLY SUSCEPTIBLE TO INNOCENT INTERPRETATION?

2. IN INTERPRETING THE INTENDED MEANING OF A DRAWING OR ILLUSTRATION ACCOMPANYING WRITTEN TEXT IN A POLITICAL BROCHURE, IS A CANDIDATE FOR PUBLIC OFFICE WHO HAS PUBLISHED THE TEXT AND DRAWING ENTITLED TO RELY UPON THE WRITTEN TEXT AS EXEMPLIFYING HIS INTENDED INTERPRETATION?

3. MAY A STATE ADMINISTRATIVE BODY, SUCH AS THE OHIO ELECTIONS COMMISSION, PUNISH A CANDIDATE FOR PUBLIC OFFICE FOR THE PUBLICATION OF A DRAWING ACCOMPANYING TEXT IN THE ABSENCE OF ANY EVIDENCE THAT HE ACTUALLY INTENDED OR CONTEMPLATED A DEFAMATORY INTERPRETATION OF THAT DRAWING?

4. IN APPLYING THE "REASONABLE READER" TEST, MAY A CANDIDATE FOR PUBLIC OFFICE BE HELD TO THE SAME STANDARD AS A MAGAZINE HAVING "A REPUTATION FOR SCRUPULOUS FACTUAL ACCURACY" SUCH AS THE NEW YORKER MAGAZINE?

5. IN APPLYING THE "REASONABLE READER" TEST, MAY PARTISAN POLITICAL SPEECH BE HELD TO THE SAME STANDARD AS PUBLICATION BY A INDEPENDENT ENTITY SUCH AS A MAGAZINE HAVING "A REPUTATION FOR SCRUPULOUS FACTUAL ACCURACY" LIKE THE NEW YORKER MAGAZINE?

TABLE OF CONTENTS

QUESTION PRESENTED

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Material Proceeedings 2

B. Statement of Facts 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 19

APPENDIX TABLE OF CONTENTS A-i

TABLE OF AUTHORITIES

CASES:	PAGE
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	12
Briggs v. Ohio Elections Comm'n, 61 F.3d 487 (6th Cir. 1995)	18
Garrison v. Louisiana, 379 U.S. 64 (1964)	18
Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6 (1970)	11,16
Harte-Hanks Communication, Inc. v. Connaughton 491 U.S. 657 (1989)	12,13
Masson v. New Yorker Magazine, Inc. 501 U.S. 496 (1991)	7,16
McKimm v. Ohio Elections Comm. (2000), 89 Ohio St.3d 139	2
Milkovich v. Lorain Journal Co. 497 U.S. 1 (1990)	7,16

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 11,12

Vail v. The Plain Dealer Publishing Co. (1995) 72 Ohio St. 3d 279 17

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OHIO ELECTIONS COMMISSION

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF OHIO

Petitioner Dan McKimm petitions for a writ of certiorari to review a judgment of the Supreme Court of the State of Ohio reversing the decision for him of the Franklin County, Ohio, Court of Appeals.

OPINION BELOW

The opinion of the Supreme Court of Ohio reversing the decision for McKimm entered by the Franklin County, Ohio, Court of Appeals, is reproduced at Appendix 1. It is published as *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St.3d 139

JURISDICTION

The decision of the Ohio Supreme Court was a final entry decided on June 14, 2000. This Court has jurisdiction pursuant to 28 U.S.C § 1257.

CONSTITIONAL PROVISION INVOLVED

Constitution of the United States, First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

STATEMENT OF THE CASE

A. Statement of Material Proceedings

In the November 1995 election for Jackson Township Trustee, Petitioner Dan McKimm (herein "McKimm") challenged the incumbent candidate, Randy Gonzalez. McKimm won the election. A few days before the voting took place, McKimm had mailed a campaign brochure to township voters.

After reading the brochure, Gonzalez filed a complaint with the Ohio Elections Commission (herein "OEC"), alleging that McKimm violated Ohio's election laws by disseminating several of the

statements included in the brochure. Specifically, Gonzalez alleged that McKimm violated Ohio Revised Code § 3517.21, which provides:

> "(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, * * * shall knowingly and with intent to affect the outcome of such campaign do any of the following:
>
> * * * *
>
> "(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."

If prosecuted criminally, conviction of violating O.R.C § 3517.21 is punishable by imprisonment for six months or fine of not more than five thousand dollars, or both. O.R.C § 3517.992 (V).

Gonzalez complained of many portions of the campaign brochure, including certain specific text and the illustration accompanying that text.

After hearing, the OEC found that numerous portions of the campaign brochure violated Ohio's election laws, including the illustration, though not the text that the illustration accompanied. The order issued by the OEC included a public reprimand of McKimm and a finding that he had violated O.R.C § 3517.21. Thus, although not itself a criminal prosecution, the administrative order was a finding that clear and convincing evidence indicated that McKimm had committed a criminal act by publishing the illustration.

McKimm appealed the OEC's order to the Franklin County Court of Common Pleas, asserting that the publication in question was protected by the First Amendment. The common pleas court affirmed the OEC's order only as it related to the illustration (Appendix 47). That court determined that the constitutional guarantees of free speech protected the *text* accompanied by that illustration and the other items that Gonzalez had challenged. It held, however, that the illustration itself was not so protected.

McKimm appealed the decision to the Franklin County Court of Appeals, and that court reversed the decision of the trial court. The Franklin County Court of Appeals held that the illustration was entitled to First Amendment protection and that OEC's order violated the First Amendment to the United States Constitution. (Appendix 32)

On June 14, 2000, the Ohio Supreme Court reversed the Franklin County Court of Appeals and reinstated the finding that clear and convincing evidence indicated that McKimm had committed a criminal act by publishing the illustration. In doing so, the Ohio Supreme Court found the publication of the illustration to be unprotected by the First Amendment. (Appendix 1)

B. Statement of Facts

In the Fall of 1995, McKimm was running for election to the position of Township Trustee of Jackson Township, Stark County, Ohio, against Randy Gonzalez ("Gonzalez.") [Tr. p. 27]

In the course of that campaign, McKimm published a brochure critical of Gonzalez. [Tr. 29] That brochure contained certain specific text and an accompanying cartoon illustration. The text and the

accompanying illustration are appended to the Ohio Supreme Court Opinion below as Appendix 1.

The text stated:

> **7. Which of the following is true?**
>
> A. Trustees have a policy of bidding **all** contracts greater than $10,000.
>
> B. Randy Gonzalez **ignored** bidding policy. He voted to contract an architect for $51,000 to design the Social Hall (pavilion) ***without taking bids.***
>
> **C.** This one is tricky. Both A and B are true.
>
> [emphasis in original.]

This textual material was accompanied by an illustration that "consists of a hand holding a bound stack of money under the corner of a table. The hand appears to be moving or waving the money." (Appendix 19)

Gonzalez brought a number of complaints about the brochure before the OEC. The only complaint material to the decision of the Ohio Supreme Court is that Gonzalez contended that the illustration implied that Gonzalez had taken a bribe.

At the OEC hearing on Gonzalez' complaint, McKimm testified as to his intended interpretation of the illustration:

> My intention was to show as clearly indicated by the text that there was a township policy in effect, which stated that any bidding, and I emphasize, any bidding, including service contracts would – that would exceed $10,000, not any bidding, any spending would have to be taken for bid and this is in direct violation and contrary to that township

> resolution, township policy, and as I have indicated before that was contrary to and a covert action and below board.
>
> And as far as I'm concerned that is an illustration of the spending of that $51,000 is contrary to the public trust that our trustees would follow that resolution and that public policy.
>
> [Tr. p. 37, l. 25 – p. 38, l. 13]

The illustration itself merely shows money being "moved or waved." There is nothing in the illustration itself to suggest that it was being handed to Gonzalez. There is nothing in the accompanying text being illustrated by that drawing that suggests in any way that Gonzalez received any money at any time for any reason.

To the contrary, the accompanying text complained of the flow of money to the architect and to no one else. The text gave the express and intended interpretation of the drawing which was simply that even though the policies of the board of trustees required bidding of all contracts greater than $10,000, an open process; that his opponent nevertheless voted to award a contract for $51,000 without taking bids, a closed process.

Again, McKimm testified as to this intended meaning:

> What Mr. Gonzalez did in my estimation and in my opinion was not come clean with the voters in the expenditure of $51,000, to what amounted to a friend without going out for bids, as was township policy.
>
> [Tr. p. 48, l. 23 – p. 49, l. 1]

Although he said that it was not binding, Gonzalez himself testified that there was in fact in effect at the time in question an approved policy of the Jackson Township Board of Trustees that they would seek competitive bids in any professional contracts that exceeded $10,000. [Tr. p. 85, l. 25 – p. 86, l. 9; Tr. p. 110, l. 11- p. 20.] Gonzalez also testified that this particular architectural contract was awarded without bids and without following that policy. [Tr. p. 111, l. 21- p. 112, l. 13.]

No evidence of any type, neither documentary nor testimonial, was introduced to contradict McKimm's testimony as to his interpretation of the illustration or the meaning that he intended to convey in using the illustration. Specifically, no evidence of any type was introduced suggesting that McKimm was made aware of, or contemplated, that this drawing could be interpreted as accusing Gonzalez of an act that was never so much as implied in the text of the brochure: receiving a bribe.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Ohio based its decision of the First Amendment question upon two cases that involve wholly different principles than are involved in partisan political advertisements.

In applying an objective or "reasonable reader" standard to assess, for First Amendments purposes, the meaning of the illustration; that Court relied expressly upon *Milkovich v. Lorain Journal Co.* 497 U.S. 1 (1990) and *Masson v. New Yorker Magazine, Inc.* 501 U.S. 496 (1991).

Neither case involved the interpretation of an admittedly partisan campaign brochure. Neither case involved the interpretation of a cartoon drawing or illustration. Neither case involved the question of

whether one publishing an illustration could be held to an interpretation of that illustration different from that expressly stated in the text that the illustration accompanied. Each of those cases was a civil case for defamation. Neither of those cases involved an administrative finding that the publication was a violation of a criminal statute. Each of those cases involved a publication in a newspaper or magazine that apparently enjoyed a reputation for scrupulous factual inquiry.

The Ohio Supreme Court decided that in determining whether the illustration was false and malicious, the only meaning to be considered was that which it believed would be given to it by an objective, reasonable-reader.

Under this standard, the OEC could find that McKimm had violated Ohio election laws even if McKimm had intended an innocent interpretation of the illustration without any evidence that he was made aware of, or contemplated, a false interpretation of the illustration.

Petitioner urges that the correct application of the First Amendment to illustrations or drawings of this type was made by the Franklin County, Ohio, Court of Appeals and improperly reversed by the Ohio Supreme Court.

The Franklin County Court of Appeals held that a finding of a violation Ohio's election laws was inconsistent with the Free Speech Clause of the First Amendment to the United States Constitution.

In doing so, that Court stated:

> While the Commission could have disbelieved the appellant [McKimm], and as such, found his testimony insufficient to rebut other evidence in the record tending to show that the appellant did, in fact, consider the

> illustration to mean bribery, no such "other" evidence exists in this record. There was no testimony from any person suggesting that appellant was made aware of, or contemplated, the possible bribery connotations of the illustration prior to its publication. Nor is there any documentary evidence supporting such a conclusion. In fact, the only evidence that the illustration depicted bribery came from Gonzalez himself.
>
> [Appendix 31]

The decision of the Ohio Supreme Court trivializes the analysis because if (and only if) McKimm asserted a particular "fact," then McKimm could be guilty if he had no reason to believe that "fact" to be true.

That Court decided that based upon a "reasonable reader analysis" the illustration in question means, and could only mean, one thing: that Gonzalez had received an illegal bribe or under-the-table payment while in office. Having assumed the truth of the critical element, it had no difficulty concluding that McKimm had knowingly published a false statement in his campaign brochure because no one has ever suggested that McKimm believed that Gonzalez took a bribe.

McKimm offered a simple alternate interpretation of the illustration : the drawing means exactly what the text accompanying the drawing clearly says that it means.

McKimm's explanation as to the meaning of the illustration has always been that the illustration is literally just that: a drawing illustrative of the accompanying text. It was intended to convey precisely what the text stated. That is, that even

though the policies of the board of trustees required bidding of all contracts greater than $10,000, an open process; that his opponent nevertheless voted to award a contract for $51,000 without taking bids, a closed process. The drawing is the hand of a trustee handing out money without open bidding.

If McKimm's interpretation of the drawing is accepted as being his intended interpretation then the drawing is clearly not a violation for the same reason that the accompanying text is not a violation. It is true.

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS PUNISHMENT FOR SPEECH THAT IS FAIRLY SUSCEPTIBLE TO INNOCENT INTERPRETATION

The Common Pleas Court and the Ohio Supreme Court chose to base their decisions upon the premise that there is no ambiguity in the meaning to be given to the illustration accompanying the text in the brochure and that McKimm must have been implying that his opponent took a bribe.

The Common Pleas Court found that the drawing carried the "clear and obvious implication that " . . . [Gonzalez], in voting to violate township policy, received money under the table in return" and that the drawing suggested that Gonzalez had taken "money under the table to award a contract without competitive bidding and therefore was guilty of bribery."

The Ohio Supreme Court agreed that the drawing was susceptible of but one reasonable interpretation -- that Gonzalez accepted money in exchange for his vote to award the unbid contract referred to in the accompanying text.

Compare this supposed implication from a drawing to the actual use of the word "blackmail" in *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970). In *Greenbelt*, the offending article actually used that word in describing the conduct of the plaintiff. If that word were to be considered in isolation, ignoring the balance of the story, then this same Common Pleas Court might have said: "this word is capable of only one reasonable interpretation: which is that Bresler was committing the crime of extortion."

In fact, in that case Bresler had argued, and the trial court had instructed the jury, that "malice" could be found from simply the use of the word "blackmail" itself. The word "blackmail" was used several times, both with and without quotation marks, and had even appeared in one of the subheadings of the story. *Greenbelt, supra*, at pages 7 and 8.

The word had not been used, however, in isolation. This Court found that the balance of the reporting was accurate and that the use of the word "blackmail" did not, in context, imply the commission of a crime, but rather merely simply described Bresler's unreasonable negotiating position.

The circumstance in *Greenbelt, supra*, is analogous to the present case. The OEC, the Common Pleas Court and the Ohio Supreme Court looked at their own interpretation of the drawing standing alone and out of context as if it were not accompanied by text that expressly gives a different explanation of the drawing.

The Tenth District Court of Appeals, in upholding its constitutional obligation to "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect" (*New York Times Co.*, 376

U.S. 254, at 285 [1964]), looked at the statement in full context, including all of the evidence in the record. The Court of Appeals found that the record disclosed two alternative interpretations of the illustration, one innocent and one incriminating.

The Court of Appeals then found that the record was devoid of any reason to prefer the incriminating interpretation over the innocent interpretation.

It is hardly earthshaking, to have found that Mr. McKimm should not be punished for having published a statement that is fairly susceptible to innocent interpretation in the absence of any evidence that he intended the incriminating interpretation or that he otherwise acted maliciously.

The Ohio Supreme Court gutted McKimm's First Amendment right to express political opinion by determining that this picture is capable of only one interpretation where at least two interpretations are offered and no evidence suggests that McKimm was even aware of the false interpretation.

This is especially so since, apart from mere interpretation of the import of the statement; this is a statement about a public official and only loses its constitutional protection if it had been made with actual malice.

To lose his First Amendment protection, McKimm would have to have made the statement in question maliciously. *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485; *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

With respect to political speech, made about a public official, in order to find actual malice, it must be the case that McKimm made a false statement either with a high degree of awareness of its probable falsity or that he had entertained serious doubts as to the truth of the statement. *Harte-Hanks*

Communication, Inc. v. Connaughton (1989) 491 U.S. 657, at 667.

This Court has expressly held that this is **not** a determination made based upon an objective standard:

> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S., at 731. **The standard is a subjective one** - there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S., at 74.
>
> *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, at 688 (1989) [Emphasis added.]

The Ohio Supreme Court refused to accept the textual material as the explanation for the accompanying illustration and upheld the public reprimand issued by the OEC to McKimm based on this drawing. It found that the illustration was "susceptible of but one reasonable interpretation—that Gonzalez accepted money in exchange for his vote to award the unbid contract referred to in the accompanying text" [Appendix 12]

The drawing itself has no labels identifying the hand holding the money. It just shows a hand waiving money. The text complains of Gonzalez

giving out money. The text does not say that Gonzalez received any money.

McKimm's explanation as to the meaning of the illustration has always been that the illustration is just that: a drawing illustrative of the accompanying text. It was intended to convey precisely what the text stated. That is, that even though the policies of the board of trustees required bidding of all contracts greater than $10,000, an open process; that his opponent nevertheless voted to award a contract for $51,000 without taking bids, a closed process. That this was, from the beginning, McKimm's response is set forth in the Court of Appeals opinion:

> In his written response to the Commission, appellant disputed Gonzalez's interpretation of the illustration, contending that it was merely a depiction of Gonzalez's decision to disregard the policy of bidding large contracts, which, according to appellant, could be fairly characterized a "under handed, less than open, and hidden beneath the table of secrecy if you will."
>
> [Appendix 23]

The Ohio Courts were presented with two alternative interpretations of the illustration, one innocent and one incriminating. In the absence of any evidence to support a finding that McKimm intended the incriminating interpretation, those Courts should have accepted that McKimm intended the innocent interpretation. This is especially so in the absence of any evidence that he had been made aware of or considered any other interpretation.

As stated by the Court of Appeals in its opinion:

> While the Commission could have disbelieved the appellant, and as such, found his testimony insufficient to rebut other evidence in the record tending to show that appellant did, in fact, consider the illustration to mean bribery, no such "other" evidence exists in this record. There was no testimony from any person suggesting that appellant was made aware of, or contemplated, the possible bribery connotations of the illustration prior to its publication. Nor is there any documentary evidence supporting such a conclusion. In fact the only evidence that the illustration depicted bribery came from Gonzalez himself.
>
> Finally, we also note that like the events described by the author in *Bose*, the illustration used by the appellant here is not free from ambiguity. While the illustration clearly depicts a hand waiving [sic] money under a table, it is not obvious that the hand depicted is necessarily that of the architect offering Gonzalez a bribe. Although the Commission and the trial court rejected appellant's interpretation that the hand was a depiction of Gonzalez's hand awarding contracts (*i.e.*, government money) in an "underhanded" manner (*i.e.*, by not subjecting them to competitive bidding), the rejection of this explanation is not sufficient to prove

that the hand is that of the architect offering a bribe, let alone render the illustration unambiguous. There is no evidence in the record showing that any particular interpretation of the illustration is required.

[Appendix 31]

A PARTISAN POLITICAL BROCHURE SHOULD NOT BE ANALYSED AS IF IT WERE A PREPARED BY AN INDEPENDENT JOURNALISTIC PUBLICATION

In *Masson v. New Yorker Magazine, Inc.* 501 U.S. 496 (1991), this Court considered that a reader of an article in New Yorker magazine could tend to take statements at face value specifically because the article was published in a magazine that enjoyed a reputation for scrupulous factual inquiry.

Similar concerns may be raised by an article published in a supposedly independent newspaper, such as was the case in *Milkovich v. Lorain Journal Co.* 497 U.S. 1 (1990).

Such a tendency toward blind reliance, however, cannot be reasonably raised in what was clearly a partisan political brochure published by one candidate about his opponent.

Rather than *Masson* or *Milkovich*, this case is more analogous to that found in *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970). In an atmosphere of vigorous and heated public debate, the Ohio Supreme Court held that "'malice' could be found from the 'language' of the publication itself." *Greenbelt*, at 10. As this Court said in *Greenbelt*, "This was error of constitutional magnitude." *Greenbelt*, at 10.

This is especially the case given that the "language" was itself a cartoon susceptible to innocent interpretation as supported by the accompanying text.

The context in which the cartoon appeared is more than normally critical since the cartoon itself doesn't contain specific "language." The Ohio Supreme Court itself has, in the past, considered this factor:

> When determining whether if speech is constitutionally protected opinion, court must consider totality of the circumstances. When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared.
>
> *Vail v. The Plain Dealer Publishing Co.* (1995)
>
> 72 Ohio St. 3d 279, Syllabus

The context in which this cartoon appeared is that of the accompanying text, which is consistent with the interpretation that was advanced by McKimm.

The truly offensive aspect of this case is the fact that it justifies "punishment" for political speech in such an ambiguous setting.

The case that is before this Court is not one wherein Gonzalez is seeking civil damages for claimed defamation. Whether the burden in such cases might be "preponderance of the evidence" for the defamation

or "clear and convincing evidence" for the questions of constitutional protection is clearly a civil matter.

In this case, however, the OEC was in its own words "punishing" McKimm by publicly branding him as a violator of O.R.C. § 3517.21 (B), a criminal offense.

CONCLUSION

The purest possible form of speech protected by the First amendment is political speech. This is, however, the only form of speech that is regulated by Ohio's election laws.

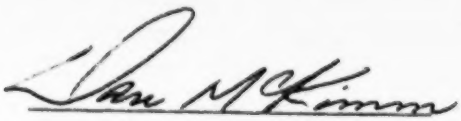
Portions of those laws have already been found by the United States Sixth Circuit Court of Appeals to violate the requirements of the First Amendment specifically because those provisions permitted regulation of speech based upon its implication rather than its plain meaning.

In *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995), the Sixth Circuit held that the former Ohio Revised Code § 3599.091(B)(1) regulated speech based upon its implication, and therefore reached more speech than that declared unprotected in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) As applied in that case, the Sixth Circuit found that the statute proscribed a campaign billboard that was subject to different interpretations, saying that the billboard in question was not so much false as it is ambiguous.

The instant case presents even a greater intrusion into protected speech. The portion of the publication found to violate Ohio's election laws did not even consist of words capable of having a plain meaning. It consisted of a drawing susceptible of differing interpretations and which could speak only by implication.

This clearly invades protected speech. The enforcement of an election law permitting such application impermissibly chills political speech.

Respectfully submitted,



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MCKIMM, APPELLEE, *v.* OHIO ELECTIONS COMMISSION, APPELLANT.

[Cite as *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St.3d 139.]

Elections — Distribution of campaign brochure containing an illustration and text that imply that candidate's opponent committed an illegal act — Ohio Elections Commission may find violation of R.C. 3517.21(B)(10), when.

When a candidate for public office distributes a campaign brochure containing an illustration and accompanying text that imply to the reasonable reader that the candidate's opponent committed an illegal act while in office, and the candidate lacks any basis to believe that the opponent committed the act depicted in the brochure, the Ohio Elections Commission may constitutionally determine that the candidate violated R.C. 3517.21(B)(10).

(No. 99-305 — Submitted January 25, 2000 — Decided June 14, 2000.)

APPEAL from the Court of Appeals for Franklin County, No. 98AP-304.

In the November 1995 election for Jackson Township Trustee, Dan McKimm challenged the incumbent candidate, Randy Gonzalez. McKimm won the election. A few days before the voting took place, McKimm had mailed a campaign brochure to township voters. A full page of McKimm's brochure consisted of "[a] multiple-choice Jackson quiz to help you select the best candidate." The quiz contained eighteen multiple-choice questions, and several of these were accompanied by small, cartoon-like illustrations. McKimm suggested the "correct" answers to the questions by indicating them in bold

print. Most of McKimm's questions mentioned Gonzalez by name and discussed Gonzalez's actions during his tenure as trustee. At the top of the page, the brochure indicated to township voters that "[r]esearch documentation" was available and provided the telephone number of McKimm's campaign chairman.

After reading the brochure, Gonzalez filed a complaint with the Ohio Elections Commission, alleging that McKimm violated Ohio's election laws by disseminating several of the statements included in the brochure. Specifically, Gonzalez alleged that McKimm violated R.C. 3517.21, which provides:

"(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, * * * shall knowingly and with intent to affect the outcome of such campaign do any of the following:

" * * * *

"(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."

Question No. 7 and its accompanying illustration were among the items Gonzalez challenged in his affidavit. Question No. 7 read as follows:

"7. Which of the following is true?

"A. Trustees have a policy of bidding **all** contracts greater than $10,000.

"B. Randy Gonzalez **ignored** bidding policy. He voted to contract an architect for $51,000 to design the Social Hall (pavilion) ***without taking bids.***

"**C.** This one is tricky. Both A and B are true." (Emphasis *sic.*)

An illustration accompanied the text of Question No. 7. In the drawing, a human hand extends toward the reader from underneath the corner of a table. The hand holds a bundle of cash, and small lines drawn around the bundle give the reader the impression of motion—as if the hand is waving the cash back and forth underneath the table. For the convenience of the reader, we have appended a reproduction of Question No. 7 and its accompanying illustration to the end of this opinion, as well as a reproduction of the "quiz" page of McKimm's brochure.

In his affidavit to the commission, Gonzalez alleged that Question No. 7 "indicates by representation that [Gonzalez] accepted money under the table, or solicited a bribe or kickback in return for awarding the contract referred to." Gonzalez denied that he ever received, solicited, or encouraged a bribe in relation to the contract. In a written response, McKimm disagreed with Gonzalez's characterization of the illustration. McKimm maintained that "[t]he drawing included with Item No. 7 of the Circular depicts my personal belief that the decision of complainant Gonzalez to disregard the Board's own policy * * * and to instead award a contract to a contractor on the basis of personal preference, and unsubstantiated 'freebies,' * * * is fairly characterized as underhanded, less than open, and hidden beneath the table of secrecy if you will."

At a hearing before the Elections Commission, McKimm conceded that he distributed the brochure

intending to affect the outcome of the campaign and to promote his candidacy. When Gonzalez's attorney asked McKimm why he included illustrations in the brochure, McKimm testified that he intended the drawings "to lend, if you will, substance or credibility to the [adjacent] text."

When the parties turned specifically to Question No. 7 and its accompanying illustration, McKimm initially argued that the drawing did not actually depict a hand waving money *under* the table. He testified that the hand was drawn either behind or to the side of the table. Nevertheless, McKimm answered affirmatively when Gonzalez's attorney asked him to refer to the exhibit depicting "the money under the table." And Commissioner Duncan stated on the record that the drawing "clearly" depicted a hand waving cash underneath the table.

McKimm conceded that he had heard of the phrase "passing money under the table," while denying that he intended the cartoon to suggest that Gonzalez had taken a bribe. When asked if he had any evidence that Gonzalez had ever taken a bribe during his tenure as trustee, McKimm replied, "No, sir."

For his part, Gonzalez testified that his vote on the unbid construction contract was a legal action that occurred at a public meeting.

Commissioner Webster urged the commission to find that McKimm's brochure "in its totality," and by clear and convincing evidence, violated Ohio's election laws, and his motion passed by a vote of five to two. Though the commission declined to refer the matter to a prosecutor, the commission issued a reprimand letter. The two commissioners who voted against the motion described the cartoon as "sleazy" and "offensive," but concluded that all of the

challenged statements in the brochure were protected by the First Amendment.

McKimm appealed the commission's order to the Franklin County Court of Common Pleas. The common pleas court affirmed the commission's order, but only insofar as the illustration accompanying Question No. 7 was concerned. The court determined that the constitutional guarantees of free speech protected the *text* of Question No. 7 and the other items that Gonzalez had challenged. As for the cash-under-the-table cartoon, however, the court agreed with the commission that the hand-under-the-table drawing carried the "clear and obvious implication that [Gonzalez], in voting to violate township policy, received money—under the table—in return." According to the trial court, the cash-under-the-table drawing suggested that Gonzalez had taken "money under the table to award a contract without competitive bidding and therefore was guilty of bribery," even though "no evidence exists to support" that implication.

McKimm appealed the decision to the Franklin County Court of Appeals, and that court reversed the decision of the trial court. The appellate court decided that "the evidence in the record is insufficient to establish by convincing clarity that [McKimm] published the illustration accompanying question No. 7 with knowledge that it was false or in reckless disregard of its falsity."

The cause is now before this court upon the allowance of a discretionary appeal.

Betty D. Montgomery, Attorney General, *Edward B. Foley*, State Solicitor, and *David M. Gormley*, Associate Solicitor, for appellant.

Daniel J. McGown, for appellee.

COOK, J. The cartoon drawing at the heart of this case presents this court with an opportunity to clarify the relationship between Ohio's election laws and the constitutional guarantees of free speech. The General Assembly empowered the Ohio Elections Commission to investigate allegations regarding the dissemination of false and misleading statements by candidates for public office in Ohio, and to take appropriate action when it concludes that a violation has occurred. The commission may exercise its authority, however, only when that authority does not clash with the freedoms of speech and press independently recognized by the United States and Ohio Constitutions.

The trial court determined that the commission properly reprimanded Dan McKimm for publishing the illustration contained in his campaign brochure. But the court of appeals reversed, holding that the commission's order violated the First Amendment to the United States Constitution. Because we determine that the court of appeals erred in its analysis of the constitutional issues in this case, we reverse.

The Elements of R.C. 3517.21(B)(10)

At the commission hearing, McKimm conceded that he distributed the brochure intending to affect the outcome of the campaign and to promote his candidacy. All that remained for the commission to determine, therefore, was whether McKimm disseminated (1) a false statement about his opponent, (2) "knowing the same to be false or with reckless disregard of whether it was false or not." R.C. 3517.21(B)(10).[1]

The court of appeals reversed the decision of the trial court on the basis of the second element

(termed "actual malice"), holding that the record did not contain clear and convincing evidence that McKimm distributed the cartoon with actual malice. Because we analyze the evidentiary requirements differently than the court of appeals, we conclude that the evidence supports the commission's findings regarding both elements.

In Part A, below, we agree with the trial court that, to the reasonable reader, McKimm's cartoon constitutes a false statement of fact: that Gonzalez accepted a bribe or received an illegal kickback when he voted to award the unbid contract. In Part B, we conclude that, since there was sufficient evidence for the Elections Commission to draw the reasonable inference that McKimm *intended* to convey the very message that he *did* convey about Gonzalez's "crime," and since McKimm admitted that he had no basis to believe that Gonzalez committed bribery during his tenure as trustee, McKimm disseminated the brochure containing this reasonable connotation of bribery with actual malice.

A. McKimm's Money-Under-the-Table Cartoon: To the Reasonable Reader, a False Statement that Gonzalez Committed Bribery

The common pleas court determined that the illustration accompanying Question No. 7 made "a clear and obvious implication that [Gonzalez], in voting to violate township policy, received money—under the table—in return." We agree. Under both the United States and Ohio Constitutions, courts assess the meaning of an allegedly libelous statement under an objective standard—that of the reasonable reader. *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1, 19; *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 282, 649 N.E.2d 182, 186.

1. The United States Supreme Court's Reasonable-Reader Standard

In *Milkovich v. Lorain Journal Co.*, the United States Supreme Court applied an objective standard to assess the meaning of allegedly libelous statements in a newspaper column concerning a high school wrestling coach's testimony before a common pleas court. (1990), 497 U.S. at 21, 110 S.Ct. at 2707, 111 L.Ed.2d at 19. The title of the column stated that the high school "beat the law with the 'big lie.' " Other statements in the column suggested that lies were told during the proceedings, such as the phrase, "If you get in a jam, lie your way out." The coach sued the newspaper and columnist, alleging that these and other statements in the column in effect accused him of committing the crime of perjury.

On appeal, the United States Supreme Court determined that "[t]he dispositive question * * * becomes whether a *reasonable factfinder* could conclude that the statements in the * * * column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." (Emphasis added.) *Id.*, 497 U.S. at 21, 110 S.Ct. at 2707, 111 L.Ed.2d at 19. The Supreme Court concluded that the average reader of the column would be left with just such an impression—that the wrestling coach perjured himself in order to avoid the athletic association's orders against his team. *Id.* To reach this conclusion, the Supreme Court did not consider the columnist's subjective interpretation of the statements in his column. Rather, the court assessed the "clear impact," "general tenor," and "impression" created by the statements in the column. *Id.*

Just after deciding *Milkovich*, the United States Supreme Court again applied an objective, reasonable-reader standard. See *Masson v. New Yorker Magazine, Inc.* (1991), 501 U.S. 496, 111 S.Ct.

2419, 115 L.Ed.2d 447. In *Masson*, the court considered whether quotations in a magazine, attributed to a noted psychoanalyst, were verbatim reports of statements that the psychoanalyst actually made or were "nonliteral * * * reconstructions" of Masson's statements. *Id.*, 501 U.S. at 513, 111 S.Ct. at 2431, 115 L.Ed.2d at 470. Because the publisher or author failed to warn the reader that the quotations might not be verbatim, and because the magazine had a reputation for "scrupulous factual accuracy," the Supreme Court concluded that "the *reasonable reader* would understand the quotations to be nearly verbatim reports of statements made by the subject." (Emphasis added.) *Id.* Taken together, *Milkovich* and *Masson* stand for the proposition that, under the United States Constitution, courts assess the meaning of an allegedly libelous statement from the perspective of the reasonable reader—not from the perspective of the publisher of the statement.

2. Ohio's Reasonable-Reader Standard

Even though this court responded to *Milkovich* by holding that the Ohio Constitution provides a separate and independent guarantee of protection for opinions, we still assess "the common meaning ascribed to the words by an ordinary reader" in order to determine whether an allegedly libelous statement is a false statement of fact. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 282, 649 N.E.2d 182, 186; *In re Harper* (1996), 77 Ohio St.3d 211, 228, 673 N.E.2d 1253, 1267. All four factors of Ohio's test for distinguishing a statement of fact from an opinion depend on the reasonable reader's perception of the statement—not on the perception of the publisher. *Vail, supra*, 72 Ohio St.3d at 282-283, 649 N.E.2d at 185-186; *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 251-253, 25 OBR 302, 309-311, 496 N.E.2d 699, 707-708.[2]

As *Milkovich*, *Masson*, *Vail*, and *Harper* demonstrate, then, the law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement. See, also, 3 Restatement of the Law 2d, Torts (1977), Section 563 ("The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."). If the law were otherwise, publishers of false statements of fact could routinely escape liability for their harmful and false assertions simply by advancing a harmless, subjective interpretation of those statements.

3. Application of the Reasonable-Reader Standard to McKimm's Cartoon

In the case at bar, the Elections Commission could not reprimand McKimm for the illustration accompanying Question No. 7 unless the cartoon, to the reasonable reader, constituted a false statement of fact about Gonzalez. R.C. 3517.21(B)(10); *Milkovich*; *Vail*. We conclude that the commission and trial court correctly assessed the meaning of McKimm's cartoon from the perspective of the reasonable reader and that the average reader would view the cartoon as a false factual assertion that Gonzalez accepted cash in exchange for his vote to award the unbid construction contract.

Commissioner Duncan explicitly referred to the appropriate standard when he said, "[O]ne wonders what it was that a *reasonable reader* would perceive after having seen this cartoon." (Emphasis added.) Shortly thereafter, Commissioner Duncan concluded—along with the other commissioners who voted to reprimand McKimm—that the cartoon unambiguously depicted Gonzalez engaging in unlawful activity. Likewise, citing *Milkovich* and *Vail*, the common pleas judge determined that McKimm's

illustration was "capable of only one *reasonable* interpretation: which is [that Gonzalez] took money under the table to award a contract without competitive bidding and therefore was guilty of bribery." (Emphasis added.)

The phrase "passing money under the table" connotes an illegal transaction made for personal gain. The drawing depicting this illegal conduct appeared adjacent to text in a "quiz" that made serious and specific allegations about Gonzalez's conduct as a trustee. The quiz even included a phone number for voters to call for documentation—suggesting that the statements therein could be proven true. And a political cartoon that falsely depicts a public official engaging in illegal conduct will not be exempt from legal redress merely because the charge is depicted graphically rather than verbally. See 50 American Jurisprudence 2d (1995), Libel and Slander, Section 152.

As the commission notes in its merit brief, "We all know what a hand under a table holding cash implies, particularly * * * in the context of a discussion about a government contract being let contrary to standard policy and without competitive bidding." McKimm's cartoon implied to the reasonable reader that Gonzalez actually accepted cash for his vote to award the lucrative, unbid construction contract. Accord *DeVito v. Gollinger* (1999), 133 Ohio App.3d 51, 56, 726 N.E.2d 1048, 1052 ("The 'under the table' transaction depicted in the cartoon is a clear accusation of bribery, a particularly egregious offense by a public official."); see, also, *Newman v. Delahunty* (1994), 293 N.J.Super. 491, 517, 681 A.2d 671, 684 (cartoon about mayor was a "not so subtle" charge of corruption).

4. The Innocent-Construction Rule

McKimm maintains that the Elections Commission could not find a violation of the election laws for speech that is "clearly susceptible [of] innocent interpretation." Here, McKimm refers to the rule that "if allegedly defamatory words are susceptible [of] two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372, 6 OBR 421, 423, 453 N.E.2d 666, 669.

The innocent-construction rule does not protect McKimm's cartoon in this case. The rule protects only those statements that are *reasonably* susceptible of an innocent construction. *Id.* "To construe a publication in an unreasonable manner in order to give it an innocent interpretation is itself incompatible with the rule's requirement that words be given their 'natural and obvious meaning.' " 8 Speiser, Krause & Gans, The American Law of Torts (1991) 436, Section 29:39, citing *John v. Tribune Co.* (1962), 24 Ill.2d 437, 181 N.E.2d 105. Because we agree with the trial court that McKimm's drawing of a hand passing cash under a table is susceptible of but one reasonable interpretation—that Gonzalez accepted money in exchange for his vote to award the unbid contract referred to in the accompanying text—the rule is inapplicable.

B. McKimm Disseminated the Cartoon with Actual Malice

Having determined that McKimm's cartoon was defamatory, we turn to the only remaining issue: whether McKimm published the cartoon with actual malice—that is, either knowing that it was false or acting in reckless disregard of whether it was false or not. R.C. 3517.21(B)(10); *Pestrak v. Ohio Elections Comm.* (C.A.6, 1991), 926 F.2d 573, 577, citing *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84

S.Ct. 710, 11 L.Ed.2d 686, and *Garrison v. Louisiana* (1964), 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125, 133.

1. The Role of the Actual-Malice Standard

By permitting liability only for those false statements about public officials made with actual malice, courts promote robust criticism of public officials in their conduct of governmental affairs. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 334, 94 S.Ct. 2997, 3004, 41 L.Ed.2d 789, 802. Public officials will often be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times, supra,* 376 U.S. at 270, 84 S.Ct. at 721, 11 L.Ed.2d at 701. By prohibiting the imposition of strict liability for false statements made against public figures, the actual-malice standard provides essential "breathing space" for the criticism that is inevitable in free debate and crucial to our democratic system. *Philadelphia Newspapers, Inc. v. Hepps* (1986), 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d 783, 790, quoting *New York Times, supra,* 376 U.S. at 272, 84 S.Ct. at 721, 11 L.Ed.2d at 701.

On the other hand, the actual-malice standard is not an impenetrable shield for the benefit of those who engage in false speech about public figures. "[F]alse speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." *Pestrak, supra,* 926 F.2d at 577. "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. * * * Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison, supra,* 379 U.S. at 75, 85 S.Ct. at 216, 13 L.Ed.2d at 133.

2. The Evidentiary Requirements of the Actual-Malice Standard

Whether the evidence in the record supports a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, 685, 109 S.Ct. 2678, 2694, 105 L.Ed.2d 562, 587. To answer this question, we are obliged to undertake an independent review of the record. *Id.* at 659, 109 S.Ct. at 2681, 105 L.Ed.2d at 571. We may not infer the existence of actual malice from evidence of personal spite or ill will alone; rather, our focus is on the publisher's attitude toward the truth or falsity of the publication. *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 520 N.E.2d 198, paragraph two of the syllabus. But evidence of ill will can be relevant: " 'This standard requires a clear and convincing showing, which may be by *circumstantial evidence*, of the defendant's actual state of mind—either subjective awareness of probable falsity or actual intent to publish falsely.' " (Emphasis added.) *National Rifle Assn. v. Dayton Newspapers, Inc.* (S.D.Ohio 1983), 555 F.Supp. 1299, 1304, quoting *Yiamouyiannis v. Consumers Union of United States, Inc.* (C.A.2 1980), 619 F.2d 932, 940.

To support its interpretation of the evidence required to support a finding of actual malice, the court of appeals relied on the decision of the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502. But the *Bose* court found clear and convincing evidence of actual malice lacking only because the author's statement—which misdescribed the sound of a loudspeaker in a Consumer Reports review—"was 'one of a number of possible rational interpretations' of an event that 'bristled with ambiguities.' " *Id.* at 512, 104 S.Ct. at 1966, 80

L.Ed.2d at 525, quoting *Time, Inc. v. Pape* (1971), 401 U.S. 279, 290, 91 S.Ct. 633, 639, 28 L.Ed.2d 45, 53. McKimm's cartoon, on the other hand, judged by the reasonable-reader standard, suggested that Gonzalez engaged in an illegal act. A cartoon that depicts the commission of an illegal act is not a "possible rational interpretation" of events when the author has *no basis* to believe that an illegal act has occurred. Accordingly, we conclude that the appellate court's reliance on *Bose* was misplaced.

In *St. Amant v. Thompson* (1968), 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262, also cited by the court of appeals, the Supreme Court discussed the evidence that is required to support a conclusion that a defamation defendant has acted in reckless disregard of the truth or falsity of his or her publication. The *Thompson* court held that "[t]here must be sufficient evidence to permit the conclusion that *the defendant in fact entertained serious doubts* as to the truth of his publication." (Emphasis added.) *Id.*, 390 U.S. at 731, 88 S.Ct. at 1325, 20 L.Ed.2d at 267.

Thompson certainly requires evidence of the defendant's subjective state of mind in order to satisfy the actual-malice standard. *Id.* at 733, 88 S.Ct. at 1326, 20 L.Ed.2d at 268. But *Thompson* also explicitly limits the ability of defendants to subvert the standard with self-serving testimony. "The defendant * * * cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, [or] is the product of his imagination * * * ." *Id.*, 390 U.S. at 732, 88 S.Ct. at 1326, 20 L.Ed.2d at 267-268.

We conclude that the record in this case clearly and convincingly confirms that McKimm's conduct surpassed the actual-malice threshold. McKimm's testimony before the commission amply supported that body's conclusion—and our own—that McKimm *intended* to convey to township voters the false message that the drawing *did* convey to the reasonable reader of his brochure.

McKimm knew that Gonzalez and the other trustees were not legally obliged to solicit bids for the construction contract before awarding it, and knew that the trustees awarded the unbid contract only after discussion in an open meeting. McKimm also testified, however, that he personally disapproved of Gonzalez's vote, and that he felt a wrongdoing had occurred. In this, McKimm saw an opportunity—for he testified that, if township voters were aware of what happened, "they would have reacted in the same fashion that I did."

But instead of merely disseminating his brochure with the bare facts that appeared in the text of Question No. 7, McKimm chose to accompany those facts with a cartoon. That cartoon, as we have already determined, unambiguously depicts a hand passing money under the table—a concept with which McKimm admitted he was personally familiar. McKimm, however, also admitted that he had *no basis* to believe that Gonzalez had engaged in any illegal conduct during his tenure as trustee. As the trial court determined, McKimm chose "to illustrate the right of the voters to question [Gonzalez's] conduct by illustrating a criminal act, where no evidence exists to support such an act."

When called to answer for his choice before the commission, McKimm admitted that he knew of the phrase "passing money under the table," and that he had no basis to believe that Gonzalez had

participated in such an act—or any illegal acts—during his tenure as trustee. McKimm also testified implausibly his drawing appeared either on the "other side of the table," or "behind the table," but "not under the table." See *Thompson, supra,* 390 U.S. at 732, 88 S.Ct. at 1326, 20 L.Ed.2d at 267-268. After our independent review of this record, we agree with the commission and the trial court that McKimm disseminated his cartoon well aware of its false implication. McKimm conveyed a message to the reasonable reader that he knew had no basis in fact.

Conclusion

The commission properly acted in this case to recognize society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer* (1966), 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605. [3]

For the foregoing reasons, we hold that when a candidate for public office distributes a campaign brochure containing an illustration with accompanying text that imply to the reasonable reader that the candidate's opponent committed an illegal act while in office, and the candidate lacks any basis to believe that the opponent committed the act depicted in the brochure, the Ohio Elections Commission may constitutionally determine that the candidate violated R.C. 3517.21(B)(10). Accordingly, we reverse the decision of the court of appeals, and reinstate the decision of the trial court.

Judgment reversed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER and LUNDBERG STRATTON, JJ., concur.

FOOTNOTES:

1. The commission must apply a standard of clear and convincing evidence with respect to

findings under R.C. 3517.21. R.C. 3517.155(D). Former R.C. 3599.091, which also forbade falsehoods in election campaigns (subsection [B]), permitted the commission to impose fines and issue cease-and-desist orders under a lesser preponderance standard (subsection [C]), but the Sixth Circuit held these enforcement methods unconstitutional, since the United States Supreme Court had determined that "no punishment may be levied in areas trenching on the first amendment involving public figures without 'clear and convincing evidence.' " *Pestrak v. Ohio Elections Comm.* (C.A.6 1991), 926 F.2d 573, 578, citing *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 285-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686, 709-710.

2. The first factor, the court's inquiry into the specific language used, focuses on "the common meaning ascribed to the words by an ordinary reader." Under the second factor, which examines whether the allegedly defamatory statement is verifiable, we noted that when a statement "lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Vail, supra,* 72 Ohio St.3d at 282-283, 649 N.E.2d at 186. The third factor considers the reaction of "the average reader viewing the words in their internal context," and the fourth factor focuses on the broader context of the statement from "the reader's viewpoint." *Scott, supra,* 25 Ohio St.3d at 253, 25 OBR at 311, 496 N.E.2d at 708.

3. McKimm argues for the first time to this court that the commission lacked the authority to send him a letter of reprimand or to punish him "by publicly branding him as a violator of O.R.C. § 3517.21(B), a criminal offense." McKimm did not raise this objection before the commission, the common pleas court, or the court of appeals.

Accordingly, we do not address this issue here. In general, "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs* (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

APPENDIX

7. **Which of the following is true?**
   A. Trustees have a policy of bidding all contracts greater than $10,000.
   B. Randy Gonzalez ignored bidding policy. He voted to contract an architect for $51,000 to design the Social Hall (pavilion) ***without taking bids.***
   C. This one is tricky. Both A.... and B. are true.

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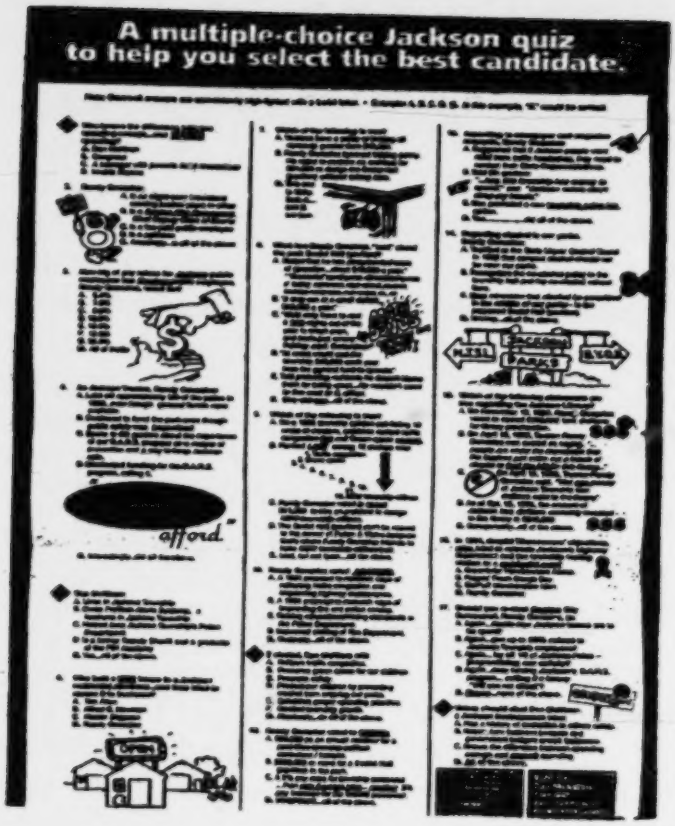
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to help you select the best candidate.
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Open

BLE COPY

Dan McKimm,

Plaintiff-Appellant

v.

Ohio State Elections Commission and Randy Gonzalez, Defendants-Appellees

CASE NO. 98AP-304.

10th District Court of Appeals of Ohio, Franklin County.

Decided on December 24, 1998.

APPEAL from the Franklin County Court of Common Pleas.

Ross, Donohew & Arnold, Ltd, Monty L. Donohew and Todd A. Harpst, for appellant.

Betty D. Montgomery, Attorney General, Elise W. Porter and David M. Gormley, for appellee Ohio Elections Commission.

OPINION

LAZARUS, J.

Appellant, Dan McKimm, appeals the decision of the Franklin County Court of Common Pleas upholding, in part, the finding of appellee, the Ohio Elections Commission ("Commission"), that appellant violated R.C. 3517.21(B)(10) when he distributed a brochure in support of his candidacy for township trustee in November 1995. Because we find that the evidence in the record is insufficient to find a violation of R.C. 3517.21(B)(10) consistent with the Free Speech Clause of the First Amendment to the United States Constitution, we reverse.

On November 4, 1995, Randy Gonzalez, then a Jackson Township trustee in Stark County, filed a complaint with the Commission against appellant, Gonzalez's opponent for township trustee in the November 7, 1995 election. Gonzalez alleged that appellant had distributed a campaign brochure that

contained numerous false statements about Gonzalez. The brochure at issue consisted primarily of a multiple-choice "quiz," in which a number of facts regarding Gonzalez's service as a trustee were asserted in an effort to show that Gonzalez was an irresponsible spender of township funds. The brochure was received by township voters on November 1 or 2, 1995. Appellant ultimately won the election.

In the brochure, several illustrations or drawings appear next to some of the multiple-choice questions. Relevant to this appeal is an illustration appearing next to question No. 7, in which appellant highlighted Gonzalez's role as trustee in voting to award an unbid contract for architectural services for a park pavilion. The entire text of question No. 7 appeared in the brochure as follows:

7. Which of the following is true?

A. Trustees have a policy of bidding all contracts greater than $10, 000.

B. Randy Gonzalez Ignored bidding policy. He voted to contract an architect for $51,000 to design the Social Hall (pavilion) without taking bids.

C. This one is tricky. Both A.... and B. are true."

The illustration appearing next to this question consists of a hand holding a bound stack of money under the comer of a table. The hand appears to be coming out from under the table reaching in the direction of the reader and appears to be moving or waving the money. A copy of the full text of question No. 7 and its accompanying illustration is attached hereto as Appendix A. In his complaint with the Commission, Gonzalez alleged, among other things, that the illustration accompanying question No. 7

depicted him as having taken a bribe or kickback in return for awarding the unbid contract referred to in question No. 7. In his written response to the Commission, appellant disputed Gonzalez's interpretation of the illustration, contending that it was merely a depiction of Gonzalez's decision to disregard the policy of bidding large contracts, which, according to appellant, could fairly be characterized a "under handed, less than open, and hidden beneath the table of secrecy if you will." (Appellant's written response, at paragraph 42.)

On September 10, 1996, a hearing was held before the Commission, and both Gonzalez and appellant presented testimonial and documentary evidence. At the conclusion of the hearing, the Commission, on a five-to-two vote, found by clear and convincing evidence that appellant had violated Ohio election laws in his brochure. Based upon such violations, the Commission issued a public reprimand of appellant.

Thereafter, appellant timely appealed the decision of the Commission to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. On January 22, 1998, the trial court issued its decision, finding that all but one (the illustration accompanying question No. 7) of the brochure's allegedly false statements were either true or protected under the First Amendment, including the text of question No. 7. As to the illustration itself, the trial court found that even though it was not clear whether the hand under the table was that of the architect or Gonzalez, the illustration was "a clear and obvious implication that [Gonzalez], in voting to violate township policy, received money under the table in return." (Trial court's decision, 34.) Furthermore, the trial court found that since appellant admitted at the hearing that no evidence existed to show that Gonzalez ever

took a bribe or that appellant ever attempted to make such a determination, the illustration was made in reckless disregard for the truth or falsity of the matter. A judgment entry affirming the decision of the Commission based solely on the offending illustration was filed by the trial court on February 12, 1998. It is from this entry that appellant timely appealed, raising the following two assignments of error:

> 1. "THE COMMISSION AND LOWER COURT ERRED IN HOLDING THAT THERE EXISTED CLEAR AND CONVINCING EVIDENCE THAT APPELLANT VIOLATED THE ELECTIONS CODE IN PUBLISHING THE POLITICAL CARTOON IN THAT THE CARTOON IS AN EXPRESSION OF THE APPELLANT'S OPINION WHICH IS AS A MATTER OF LAW CONSTITUTIONALLY PROTECTED FROM SANCTION BY A STATE ADMINISTRATIVE AGENCY."
>
> 2. "THE COMMISSION AND LOWER COURT ERRED IN HOLDING THAT THERE EXISTED CLEAR AND CONVINCING EVIDENCE THAT APPELLANT VIOLATED THE ELECTIONS CODE IN PUBLISHING THE POLITICAL CARTOON IN THAT THERE is NO EVIDENCE IN THE RECORD DEMONSTRATING APPELLANT PUBLISHED A PROVABLY FALSE STATEMENT WITH ACTUAL MALICE AND THE CARTOON IS AS A MATTER OF LAW INCAPABLE OF PROVABLY FALSE MEANING."

Here, both the Commission and the trial court found that appellant had violated R.C. 3517.21(B)(10), which prohibits a person from

disseminating "a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." In general, when an appeal is brought from an order of an administrative agency pursuant to R.C. 119.12, the court of common pleas must affirm the order if it is supported by reliable, probative, and substantial evidence. Univ. of Cincinnati v. Conrad (1980), 63 Ohio St.2d 108. Moreover, appellate review of a trial court's decision is generally limited to a determination of whether or not the trial court abused its discretion in its review. Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 621.

However, on the question of whether of not an agency's order is in accordance with the law, our review is plenary. Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 339. This is especially true in cases where the First Amendment is implicated. In such cases, "an appellate court has an obligation to `make an independent examination of the whole record' in order to make sure that `the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union of United States, Inc. (1984), 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (quoting New York Times Co. v. Sullivan [1964], 376 U. S. 254, 284-286, 84 S.Ct. 710, 728-729). Here, because Gonzalez was a public figure and appellant's allegedly false statement concerned Gonzalez's performance of his public duties, this case obviously raises First Amendment issues, and in particular the "actual malice" standard of New York Times Co., supra, and its progeny.

Under the actual malice standard, a person cannot be held liable (or otherwise punished) for

making a false statement unless it is shown by clear and convincing evidence that the person made the statement knowing that it was false or with reckless disregard of whether it was false or not. Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 94 S.Ct. 2997. This standard is explicitly incorporated into R.C. 3517.21 (13)(1 0)s prohibition against making a false statement about a candidate knowing it to be false or in reckless disregard for its falsity and R.C. 3517.155(D)(1)'s requirement that the Commission find a violation of such rule only upon a showing by clear and convincing evidence. Whether the evidence in the record is sufficient to support a finding of actual malice is a question of law. Harte-Hanks Communications, Inc. v. Connaughton (1989), 491 U.S. 657, 685, 109 S.Ct. 2678, 2694. Thus, mindful of our obligations under the First Amendment and this court's authority to review the correctness of an administrative agency's legal determinations, we must exercise our independent judgment in deciding whether the evidence in the record here establishes, by clear and convincing evidence, that appellant published the offending illustration in his campaign brochure with actual malice--i.e., with knowledge that it was false or in reckless disregard of its falsity. See Hummel v. Ohio Elections Comm. (Dec. 16, 1997), Franklin App. No. 97APE06-825, unreported (1997 Opinions 5267, 5270); see, also, Perez v. Scripps-Howard Broadcasting Co. (1988), 35 Ohio St. 3d 215, 218; Dale v. Ohio Civ. Serv Emp. Assn. (1991), 57 Ohio St. 3d 112, 117.

Although the actual malice standard "cannot be fully encompassed in one infallible definition," St. Amant v. Thompson (1968), 390 U.S. 727, 730, 88 S.Ct. 1323, 1325, the Supreme Court has made it dear that, to satisfy the standard, it must be shown that the person: (1) made the allegedly false

statement with a high degree of awareness of its probable falsity; or (2) must have entertained serious doubts as to the truth of the statement. Harte-Hanks Communication, supra, at 667, 2686; see, also, Perez, supra. The standard is a subjective one; the focus is on the person's attitude toward the truth or falsity of the published statements. Harte-Hanks, supra; Perez, supra. Here, under such standards, we find that the evidence was insufficient to support a determination that appellant caused the offending illustration to be published knowing it to be false or in reckless disregard for its falsity.

In so doing, we find Bose, supra, to be closely analogous to this case and highly persuasive. In Bose, the plaintiff, a speaker manufacturer, sued Consumer Reports ("CR") for product disparagement, alleging that CR made false statements in an article reviewing certain speakers-in particular, that the instruments heard through the Bose speakers tended to wander "about the room." Based primarily on the testimony of the article's author, the trial court found that this statement was false because the author had actually found that the instruments heard through the speakers tended to wander "along the wall" rather than "about the room." In addition, the trial court found that the statement about the instruments tending to wander "about the room" was made with knowledge of its falsity. In so doing, the trial court rejected the author's testimony, and CR's argument, that the phrase "about the room" could be understood in context to mean lateral movement:

> "'If [the author] is to be believed, at the time of publication of the Article he interpreted, and he still interprets today, the wo[illegible] "about the room" to mean "along the wall." After careful consideration of [the author's] testimony

> and of his demeanor at trial, the Court finds that [the authors] testimony on this point is not credible. The [Author] is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain ordinary meaning.'" Id. at 497, 1958.

Based upon the foregoing findings, the trial court held that at the time the article was published, the author knew that the words "about the room" did not accurately describe the effects that he heard during the test, and as such, he published a false statement with the knowledge that it was false or with reckless disregard of its falsity.

In affirming a reversal by the court of appeals, the United States Supreme Court held that the evidence presented at trial was insufficient under the clear and convincing standard to establish that the author published the statement with actual malice. In so doing, the Supreme Court accepted the trial court's determination that the phrase "about the room" did not mean "along the wall," that the author's testimony to the contrary was not credible, and that, as such, the statement was false. The Supreme Court held, however, that even if the trial court did not believe the author's interpretation of the phrase "about the room," this alone was insufficient to support a finding that the author was aware, at the time of the publication, that the statement was probably false or that he entertained serious doubt about its truthfulness.

> "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited

> testimony is not considered a sufficient basis for drawing a contrary conclusion.* * * In this case, the trial judge found it impossible to believe that [the author] continued to maintain that the word `about' meant `across.' [The author's] testimony does not rebut an inference of actual malice that the record otherwise supports, but it is equally clear that it does not constitute clear and convincing evidence of actual malice. [The author] displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication." Id. at 512, 1966 (emphasis added).

The Supreme Court further noted that the language chosen by the author was used to describe an event that itself "`bristled with ambiguities.'" Id. at 512, 1966 (quoting Time, Inc. v. Pape [1971], 401 U.S. 279, 290, 91 S.Ct. 633, 639). As such, even though the choice of such language ultimately proved to be inaccurate, the inaccuracy alone did not place it outside the broad protective umbrella of the First Amendment. As noted by the Court "[u]nder the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time." Id. at 512, 1966.

Here, like in Bose, the evidence in the record is insufficient to establish by convincing clarity that appellant published the illustration accompanying question No. 7 with knowledge that it was false or in reckless disregard of its falsity. First, nothing in appellant's testimony supports such a finding. In fact, appellant testified at the hearing that he believed everything in the brochure was true when it was published and maintained that he still believed everything in it was true at the time of the hearing. As to the illustration itself, appellant specifically denied that he ever considered it to be a depiction of Gonzalez taking a bribe and further testified that he always understood it to be a graphic depiction of the text of question No. 7, i.e., the "hidden" nature of spending taxpayer money on unbid contracts. In particular, appellant testified that he understood the illustration as depicting "[t]axpayer's dollars being waived, being flashed and being spent in a covert, irresponsible, less than open fashion." (Tr. 220.) Finally, appellant testified that he first learned that the illustration could be interpreted as depicting bribery when he was notified by the media on the Friday after the brochure had been published that Gonzalez had filed a defamation lawsuit against appellant.

While the Commission could have disbelieved the appellant, and as such, found his testimony insufficient to rebut other evidence in the record tending to show that appellant did, in fact, consider the illustration to mean bribery, no such "other" evidence exists in this record. There was no testimony from any person suggesting that appellant was made aware of, or contemplated, the possible bribery connotations of the illustration prior to its publication. Nor is there any documentary evidence supporting such a conclusion. In fact, the only

evidence that the illustration depicted bribery came from Gonzalez himself.

Finally, we also note that like the events described by the author in Base, the illustration used by the appellant here is not free from ambiguity. While the illustration clearly depicts a hand waiving money under a table, it is not obvious that the hand depicted is necessarily that of the architect offering Gonzalez a bribe. Although the Commission and the trial court rejected appellant's interpretation that the hand was a depiction of Gonzalez's hand awarding contracts (i.e., government money) in an "underhanded" manner (i.e. by not subjecting them to competitive bidding), the rejection of this explanation is not sufficient to prove that the hand is that of the architect offering a bribe, let alone render the illustration unambiguous. There is no evidence in the record showing that any particular interpretation of the illustration is required. Therefore, given the ambiguous nature of the illustration, a finding that appellant violated R.C. 3517.21 (13)(10) is inconsistent with the First Amendment, absent evidence that appellant contemplated its potentially false meaning. Here, there is no such evidence. Thus, while appellant may have been negligent in using an illustration that could be seen as depicting his opponent as taking a bribe, negligence alone is insufficient to support a finding of malice. See Dale, supra, at 118 ("Mere negligence is not enough to establish actual malice.").

We find appellant's second assignment of error to be well-taken. The evidence in the record is insufficient to support a finding of actual malice as required under the First Amendment and as incorporated into the language of R.C. 3517.21(B)(10). Because our disposition of appellant's second assignment of error alone mandates a reversal of the

trial court's decision, appellant's first assignment of error and the issues raised therein are rendered moot. App.R. 12(A)(1)(c).

For the foregoing reasons, the second assignment of error is sustained, the first assignment of error is overruled as moot, and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law, consistent with this opinion.

Judgment reversed and cause remanded.

TYACK and MASON, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO CIVIL DIVISION

DAN McKIMM, et al., Appellant,

vs.

THE OHIO ELECTIONS COMMISSION, et al,

Appellee.

CASE NO. 96CVF-10-8074 JUDGE BESSEY

DECISION ON ADMINISTRATIVE APPEAL

Rendered this - day of January, 1998. BESSEY, J.

This case is an administrative appeal brought by Appellant, pursuant to R.C. §119.12, following a determination of the Ohio Elections Commission that Appellant had violated R.C. §3517.21(B)(9) and (10).

Jackson Township is located in Stark County, Ohio. Township trustees there are elected in odd numbered years. In 1995, Appellant, the challenger, (Exhibit A) ran against Appellee, incumbent Randy Gonzalez ("Appellee") Less than one week before the election, Appellant caused a brochure to be disseminated whicb he and his campaign staff had produced.[1] Appellee, upon examining the brochure, ffied a complaint dated November 3, 1995, with. the Ohio Elections Commission ("Commission~'). The Commission received it on Election Day, 1995. In this complaint, Appellee charged a number of statements in the brochure violated R.C. §3517.21.

Appellant won the election. Thereafter, a hearing before the Commission was held, on September 10, 1996. After a professional presentation by counsel for both sides, the Commission voted 5-2 that a violation occurred. Rather than refer the matter for prosecution, the Commission issued a public repriinand to Appellant, who timely filed this appeal.

The issue in this case raises issues regarding election campaigns and the standards by which they are run. The ultimate question before this Court is whether or not Appellant violated R.C. §3517.21. That statute reads in pertinent part as follows:

> (B) No person, during the course of any campaign for.. election to public office..., by means of campaign materials.. shall knowingly and with intent to affect the outcome of such campaign do any of the following:
>
> (9) Make a false statement concerning the voting record of a candidate or public official;
>
> (10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

There is no dispute between the parties that what occurred in this case occurred during a campaign for public office between Appellant and Appellee; that what occurred was done by Appellant with intent to affect the outcome of the campaign; and that the brochure involved was distributed or disseminated by Appellant.

The material in question is a one page "multiple choice" quiz "to help you (the Jackson Township voter] select the best candidate." Underneath the headline is a sentence that reads: "Research documentation is available for review by

calling Gerald Werner, Committee Chairman at 494-7256."

What follows are 16 questions with multiple choice answers. The voters are "assisted" insofar as the letters identifying the "correct" answers are already highlighted for them For visual variety, illustrations appear with some of the questions. The illustration that has drawn the most attention appears alongside question 7.

The question to which this illustration refers reads as follows:

7. Which of the following is true?

A. Trustees have a policy of bidding all contracts greater than $10,000.

B. Randy Gonzalez **ignored** bidding policy. He voted to contract an architect for $51,000.00 to design the

Social Hall (pavilion) **without taking bids.**

C. This one is tricky. Both A...and B. are true.

(Emphasis in original)

The illustration itself consists of part of a table, with a table leg attached. Just to the left of the table, and underneath it, is a hand, which is holding a packet of cash. There are two slightly curved lines on the upper left and lower right of the case. Such lines are used by illustrators to suggest motion, and that is the case here. The implication is immediately obvious

and clear: the hand is offering money under the table. Offering money under the table implies bribery, which is a felony pursuant to R.C. §2921.02. Although Appellant has testified to the contrary, there is absolutely no question but that this drawing depicts a hand offering money under the table[2].

Appellant argues that it is unclear from the illustration whose hand is being depicted. Appellant is correct, in terms of the illustration. It is here that the content of the suggested answers becomes relevant. This question mentions "trustees", a clear reference to Jackson Township trustees, and two people: "an architect~' and Appellee. The hand either belongs to the architect or to Appellee. The illustration is a clear and obvious implication that Appellee, in voting to violate township policy, received money-under the table-in return.[3] Appellant has admitted that no evidence exists that Appellee ever took a bribe, much less that he took one in this instance. 3

Appellee has objected to several other portions of the "quiz" as well. Specifically, he also takes issue with questions two, six, ten, thirteen, fourteen, and sixteen.

Question two is about Appellee. Each answer given, with the arguable exception of the word "bureaucrat", is true: Appellee was an eight year incumbent, he was seeking twelve years in office, his salary as chief deputy clerk of courts is paid by tax dollars, and, by running for office, he is a politician. Appellee, like other people who are employed by government, may be considered to be a "bureaucrat". Appellee's ire is not based upon the text but on the illustration: a figure "8" smiling and carrying a "more taxes" sign.

Question six asks "Who built a new home...and then tried to rezone it to business?" The suggested answers are, except for Appellee's name, humorous. The illustration shows three homes, with the one in front carrying a large "Open" sign on the roof, as in "open for business". Appellee argues that he never tried to have the residence zoned business, but did get it rezoned from residential to R-2, which allows smaller lots.

Appellee objects to the first answer to question ten. He states that he did not vote against a proposal to relieve traffic congestion, as that was the largest problem the township faced.

Appellee objected to question thirteen because of two quotations that he alleged were taken out of context. The first quotation: "...hey, this township has money to spend." The second quotation: "Jackson voters don't strap my hands." Placed together, they strongly suggest a person who has unfettered discretion to spend Jackson Township monies.

Appellant admitted, however, that these quotations were lifted from two separate answers to very different questions. The first quotation comes from the answer to this question[4]: "Why did you run for trustee?" Appellee's answer: "Because I watch parents tie box springs to the backs of their cars to drag baseball fields, trying to make a safe place for the kid to play. I said, hey, this township has money to spend, why are we ignoring our youth[?]." The second quotation was in answer to this question: "Will you run for higher office?" Appellee's answer: "No. I don't want to be a legislature for people who don't want to help themselves. Jackson voters don't strap my hands, they want things done and they vote for them." Appellant testified he believed both

statements to be true, and he denied taking them out of context.

Question fourteen, referring to alcohol in township parks, is objected to by Appellee on the ground that he has not changed his position on this issue.

Question sixteen refers to the relocation of Jackson Township's highway department and township fueling station into a residential area. Appellant alleged that Appellee tried to relocate these over homeowners' objections. Appellant testified, however, that he knew Appellee voted to have a study done as to where they should be located. Appellant testified he knew that study said the refueling station should not be placed on the property in question, and that Appellant voted not to locate the buildings there. A witness, Mr. Snee, who had run against Appellee in the past, testified that what the brochure referred to was a previous incident where the township trustees, including Appellee, did vote to buy property, zoned commercial, but adjacent to a residential area, with the intent of putting the highway department and fueling station there. He testified there was a large uproar and the trustees voted to have the study, referred to above, done, and they agreed to abide by the result, whatever it was.

On administrative appeals, the scope of review involves a determination as to whether reliable, probative and substantial evidence exists to support the decision of the commission below, and whether the commission's action was in accord with law. Our Place Inc. v. Ohio Liquor Control Commission (1992), 63 Ohio St.3d 570; Arcuragi v. Miami Universitv (1995), 103 Ohio App.3d 322. The second prong of that test requires a reviewing court to make its own independent judgment as to whether the agency action is in accordance with law. Ohio Historical

Societv v. State Employment Relations Board (1993), 66 Ohio St.3d 366, 471. Because this case involves First Amendment considerations, this Court is making an independent review of the record. Citv. ex rel Newlin. v. Downing (1989), 43 Ohio St.3d 109, syllabus five.

In the matter *sub judice* Appellee Commission publicly reprimanded Appellant for violating R.C. §3517.21.

Appellant assigns three errors, any one of which, if accepted, would cause this Court to reverse the decision of the Commission. Appellant first claims that sanctioning him was error because Exhibit 3, the handout, constitutes "unqualifiedly protected opinion".

This Court begins its review of this case with an understanding of the necessity, in a constitutional republic, of uninhibited, robust, and wide open debate on any and all public issues. New York Times v. Sullivan (1964), 376 U.S. *254,* 84 S.Ct. 710, at 720. Article I, Section 11 of our state constitution states, in relevant part, that:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right, and no law shall be passed to restrain or abridge liberty of speech, or of the press.

Appellant argues, first, that a partisan political campaign brochure authored by a candidate for public office contains the candidate's opinions, and therefore is constitutionally protected speech. He adds that because there is no such thing as a "false idea", Gertz v. Robert Welch. Inc. (1974), 418 U~S.

323, 339, what he has written and disseminated merely an opinion, and not fact.

This argument is without merit. The Gertz quotation, upon which Appellant relies, has been noted to be mere dictum in Milkovich v. Lorain Journal Co. (1990), 497 U.S. 1, 110 S.Ct. 2695, 2705. Furthermore, the United States Supreme Court quoted with approval Judge Friendly's observation that the passage relied on by Appellant:

> • . has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question. Id at 2705,497 U.S., at 18.

The Supreme Court went on to say that:

> Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exception for anything that might be labeled "opinion.".. Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.
>
> ..•As Judge Friendly aptly put it, "[It) would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct) simply by using, explicitly or implicitly, the words 'I think.'"
>
> Id., at 2706, 407 U.S., at 19.

It is at this point where the United States Supreme Court and the Ohio Supreme Court begin to part ways. In Milkovich, the United States Supreme Court refused to mandate an inquiry into whether a statement is "opinion" or "fact". That Court first held that these tests evolved as a "mistaken reliance on the Gertz dictum, Id., and declined to create . . an artilicial dichotomy between "opinion" and fact. Id.

But under the Ohio constitution, our Supreme Court has adopted a four part test to determine if a statement is opinion or fact. Before discussing that test, this Court will note that based upon the foregoing, and insofar as the United States Constitution is concerned, Appellant's argument is without merit.

The Gertz quotation was the genesis of the Ohio Supreme Court's decision in Scott v. News Herald (1986), 25 Ohio St. 3d 243, approved and followed in Vail v. The Plain Dealer Publishing Co. (1995), 72 Ohio St 3d 279, syllabus. There, the Chief Justice expressly noted that regardless of the outcome in Milkovich,

> . . . the law in this state is that embodied in Scott.
>
> Id at281.

The Court held the Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press. The Court then stated:

> However, we do not perceive this distinction to be as great as it may appear. As Justice Brennan observed in his dissent to Milkovich,

> the factors used to determine whether a statement implies actual facts "are the same indicia that lower courts have been relying on. ..to distinguish between statements of fact and statements of opinion... Id.

Chief Justice Moyer, writing for the Court, then concluded that while this may be "a distinction without a difference", it alters the method of analysis.

The four factors enunciated in Scott and approved in Vail are: 1) the specific language used, 2) whether the statement is verifiable, 3) the general context of the statement, and 4) the broader context in which the statement appeared. Scott, at 250; Vail, at 282. The Supreme Court cautioned that this was not a "bright line" test, but established parameters within which each statement or utterance may be judged. The Court recognized the standard must be fluid.

Under either standard there is such a thing as a false idea in the sense that not everything is opinion. To that extent that Appellant's argument is erroneous.

The specific "language" used in this case is a drawing. However, as previously noted, this picture is capable of only one reasonable interpretation: which is Appellee took money under the table to award a contract without competitive bidding and therefore was guilty of bribery. This Court makes that determination by the standard of clear and convincing evidence. Such a statement is libel per se.

The second test is whether the statement is verifiable. This Court believes that it is. Examinations into the bank records of Appellee or of the architect, could determine whether money was paid to Appellee. There is no evidence that the Appellant ever tried to

make such a determination. While Appellant's attitude towards Appellee is irrelevant for constitutional purposes, this does speak to his recklessness.

The third test is the general context of the statement. Here, unlike Vail, there is nothing indicating that this is an "opinion" or "commentary". There is nothing to suggest that this was a "forum". Instead, there is a reference to the availability of "research documentation" and a phone number to obtain it.

On the other hand, this Court notes that there are several light-hearted touches in this handout. The "answers" to several of the questions include fictitious but well-known names such as Homer Simpson, the Poppin Fresh Dough-Boy, and others. These inclusions do inject humor into the handout and make it clear this is not a legitimate research paper. But the statements that refer to Appellee were intended to be taken seriously, and were represented to be things he had done or said.

On the whole, this Court is convinced that the "quiz" was meant to be easy and is for that reason those comic characters were included. Clearly, only one person was ever meant to be identified as the perpetuator of things the voter should be upset abeut. It is readily apparent that Appellant could hardly have made his point had he put in

names of other trustees who also voted as Appellee did.

In that sense this "quiz" had a serious vein. There were specific and detailed questions about events that had occurred in the township in preceding years.

The key factor in this case is the last one: the broader context in which this statement appeared.

Appellant argues that this was an election, and, citing Celebrezze v. Netzlev (1988), 1988 Ohio App. Lexis 3153, states that the medium of transferring the information must be considered, and, as the court m Celebrezze stated:

> The purpose of the brochure was to promote the election of Republican candidates and defeat the election of Democratic nominees. It could hardly be expected that any Democratic candidates would be glorified within the pages of a pamphlet urging the election of Republicans and published by the local Republican party. Similarly, any Republican candidate for office would not expect fair representation in a publication distributed by the Democrat party. Readers should expect rampant partisan opinion, puffery, and bias in such one-sided vehicles of communication. Id., at 3160. (citations omitted)

While illustrative, this passage begs the question. No one expects partisan political brochures or handouts to be in any way complimentary to the opposition. One expects an all-out partisan effort in the campaigning including negative campaigning. But this does not mean that there are no First Amendment limits to campaigning. This Court holds that the limit is reached where a candidate for public office clearly and convincingly states or implies, without basis to do so, and with malice, that another candidate has committed a felony.

Russell v. McMillen (Col. App. 1984), 685 P.2d 255, heavily relied on by Appellant, is distinguishable from the case *sub judice*

There was ample evidence that Russell engaged in nefarious conduct of a potentially criminal nature, had personally profited from this misconduct, and that he had a real conflict of interest. No such facts appear here. Although the contract was let without competitive bidding Appellant knew the Appellee could not accomplish this act without the involvement of the other trustees. Further, there was nothing within the knowledge of Appellant that suggested any criminal wrongdoing.

This holding is not in conflict with the decision of the Fifth District Court of Appeals holding that if a suggestion of criminality is a reasonable inference from something a public official has said or done, that inference may be drawn. Spicocchi v. Citv of Massillon (1995), 1995 Ohio App. Lexis 3602.

The next issue is whether or not Appellant published the statements with malice. Malice, in this context, is defined as publishing a statement with knowledge that the statements are false or with reckless disregard of whether it was false or not. New York Tinies v. Sullivan supra; Scott, supra, at 248. Actual malice **may not** be inferred from evidence of personal spite, ill-will, or intention to injure on the part of the writer. Becklev Newspapers Corp. v. Hanks (1967), 389 U.S. 81,82; Scott, at 248. The focus is on the defendant's attitude towards the truth or falsity of the publication, and a public official may recover only upon clear and convincing proof of actual malice. Gertz v. Robert Welch. Inc. (1974), 418 U.S. 323, 342. There must be a showing that the false statements were made with a high degree of awareness of their probable falsity. Garrison v. Louisiana (1964), 379 U.S. 64, 74. Indeed, qualifications of a candidate for public office presents the arguably strongest possible case for application of the New York Times rule.

Ocala-Star Banner Co. v. Dalton (1971), 401 U.S. 295, 300-301.

Appellant has argued that he believed that the statements to be true. However, the naked assertion that he "believes" is not sufficient to dispel the existence of malice.

Appellant admitted in his testimony that he had no evidence that Appellee ever took a bribe. He had no evidence that Appellee took money under the table in this case, or in any other. He was aware that bribery is and was against the law.

Appellant testified that he undertook to establish the veracity of the statements he used. First, he argues that the statements used in Question 7 are in fact true. For the most part, Appellant is correct. Appellee agreed that for about two years it had been the practice of Jackson Township trustees, and the policy for less than a year, to bid contracts with a value of over $10,000.00. On this particular contract, which involved a park pavilion, the contract was not bid, because the architect had been involved in every park project from the beginning. There was some dispute about the propriety of this. As one trustee stated, "You don't bid an $800,000 project this way. You just don't. You don't give them to your buddy." The article in which that quotation appeared also attributed to that trustee that it was a board policy to get bids.

Appellant was aware from attending board meetings, and from reading the above in the local newspaper, that this policy existed. He testified in deposition that he was aware of another instance where bids were not taken on a contract in excess of $10,000.00. However, his counsel stated before the Commission that this was a subject of a correction in the "errata" sheet of the deposition, and Appellant

testified he didn't know if he knew about that other incident or not at the time Exhibit 3 was prepared and circulated.

From the foregoing, and mindful of the principles enunciated above, this Court concludes that Appellant was within his rights to publish the text of 7(A) and 7(B).

Appellant was also within his First Amendment rights to publish 7(C). Whether arriving at the "correct" answer involves trickery or not is a matter of opinion, but in this instance the opinion is likewise constitutionally protected. This Court agrees with Appellant's argument that Appellant had knowledge of available credible information which would certainly allow him to suggest that the voters could legitimately question Appellee for voting to award the contract in this manner. The wording of the text of Question 7 does not possess any element of malice, at least in the constitutional sense.

Appellant then connects the illustration to the question by arguing that it is a rhetorical device to cause the voters to question the conduct of Appellee. The problem is not so much with the objective but rather with the means used to accomplish the objective. Appellant has chosen to illustrate the right of the voters to question the conduct by illustrating a criminal act, where no evidence exists to support such an act. This is not "honest, inaccurate utterance", Garrison v. Louisiana (1964), 379 U.S. 64, 75. This is a reckless disregard for the truth or falsity of the matter.

That bribery has previously existed regarding bid or unbid contracts does not entitle Appellant to defame Appellee by claiming it existed here, in the absence of even a scintilla of evidence to the contrary. To hold otherwise is to give any candidate a license to

smear simply because some third party has committed bribery at a different time and/or place. This election involved two particular candidates, not the lowest common denominator of any two candidates.

Based upon the foregoing, therefore, this Court holds that the finding of the Commission was proper, and, under the standards enunciated above, finds that by clear and convincing evidence that Appellant did violate R.C. §3521.17(B) (1O) insofar as the illustration to Question 7 was concerned.

Appellee argues that other questions in the handout are likewise unprotected. Of these, based upon the principles enunciated above, his objections to Question 6 are overruled, for the reason that the act of Appellee's agent in attempting to rezone the property is to be imputed to the principal. Further, Appellee was quoted in the newspapers which are a part of this record as favoring such a rezoning. This Court finds, therefore, that this question is constitutionally protected.

Question 14 is likewise constitutionally protected. A careful reading of the question in light of the record indicates no contradiction is involved here. Appellee had opposed having alcohol in the park, and, insofar as the record is concerned, continues to do so. But given the costs associated with the Social Hall pavilion in the park, Appellee has also considered allowing alcohol there, depending on the will of the people. The record indicates that he had initially favored this approach. The question makes it clear that alcohol would be limited to the social hall. This Court finds nothing constitutionally objectionable here and based upon the above principles agrees with Appellant's position regarding all remaining questions

Within ten days of the journalization of this Decision counsel for the Ohio Elections Commission shall prepare the appropriate entry and submit it to the Court for Approval.

/s/ JOHN P. BESSEY, JUDGE

1. A copy of the brochure is attached to this opinion.

2. Appellant"s testimony: "It's clearly (sic) that the hand is not underneath the table." He stated the hand was on the "other side" of the table. This Court, after many reviews of this illustration, find this testimony to be at best a clever use of words (with the "top" and "bottom" of the table being referred to as "sides"), and at worst a delusion. Counsel for Appellant noted that only one hand is presented. That is irrelevant: the hand with the money is clearly the hand belonging to the recipient of the "illegal" favor. The one to the receive the cash is the person who performed his end of the "quid pro quo", in this case, Appellee.

3. Appellee denies violating the policy. He testified that the policy could be altered or "not used" by any future board, if tax dollars could be saved. On the other hand, he could not testify that tax dollars were saved here. Based on all the testimony, this Court does not find that the text of question seven is in violation of R.C. §3517.21.

4. Both questions were asked while Appellee was being questioned by sixth graders.